

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

July 13, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 18, 2009

Case Number: TSO-0704

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." ¹ For the reasons set forth below, I conclude that the individual should not be granted a security clearance at this time. ²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, who requested a security clearance on his behalf in connection with that employment. As part of the process of applying for access authorization, the individual completed a Questionnaire for National Security Positions (QNSP), and was interviewed by an Office of Personnel Management (OPM) investigator. During this interview, the individual provided information that was inconsistent with information that he provided on his QNSP. Because this inconsistency raised security concerns, the local security office (LSO) conducted a Personnel Security Interview (PSI) in June 2008. When the LSO determined that PSI did not resolve these concerns, it informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter.

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

The Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to the individual's admission during his PSI that he deliberately failed to mention on his February 2008 QNSP that he used marijuana in October 2006 and April 2007. Information of this type is defined as derogatory in paragraphs (f), (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.³ The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced five exhibits into the record of this proceeding and the individual introduced six exhibits. He also presented the testimony of five witnesses, in addition to testifying himself.

II. DEROGATORY INFORMATION AND THE ASSOCIATED SECURITY CONCERNS

On February 29, 2008, the individual completed and signed the QNSP in question. Section 24(a) of that Questionnaire asks "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . . ?" Applicants who answer this question in the affirmative are required to describe each instance of illegal usage. The individual indicated that he had not used marijuana or any other illegal drug within the specified period. DOE Exhibit (Ex.) 3.

However, during an April 14, 2008, interview with an OPM investigator, the individual admitted that he had used marijuana on two previous occasions, once in 2006 and once in 2007. DOE Ex. 5 at 3. During his PSI, the individual stated that, although he knew that it was illegal, he smoked marijuana in October 2006 at a party and April 2007 at a concert. June 19, 2008, PSI, DOE Ex. 2 at 7, 14. He added that he omitted this information from his QNSP because he thought that doing so would improve his chances of receiving a security clearance, but that he later decided to admit his usages to the OPM investigator because it "would be better just to be honest about that." *Id.* at 8.

³ Criterion (f) defines as derogatory information indicating that the individual "has deliberately misrepresented, falsified, or omitted significant information from . . . a [QNSP or] written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization" Criterion (k) pertains to information indicating that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.) except as prescribed or administered by a physician" or otherwise authorized by federal law. Under criterion (l), information is derogatory if tends to show that the individual is not honest, reliable or trustworthy; or if it furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of national security.

This derogatory information adequately justifies the DOE's invocation of criteria (f), (k) and (l), and raises significant security concerns. Conduct involving lack of candor or dishonesty can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Use of an illegal drug can also raise questions about an individual's reliability and trustworthiness, both because such usage may impair judgement and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E and H (Adjudicative Guidelines).*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *See Personnel Security Hearing, Case No. VSO-0013, (1995) (affirmed by OSA, 1996), and cases cited therein.* The regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

A. Criterion (k)

At the hearing, the individual testified that, with the exception of the 2006 and 2007 incidents that he described in the PSI, he has never used marijuana or any other illegal drug. Hearing Transcript (Tr.) at 106. This testimony is supported by the testimony of his fiancée (and current co-habitant), his brother, two friends, and a co-worker, each of whom testified that, to their knowledge, the individual had not used illegal drugs on any other occasion. Tr. at 16, 27, 46, 60, 125. The fiancée also testified that the individual has become a more mature and responsible person since his marijuana usages, having purchased a house and become engaged to be married. Tr. at 28. The

individual indicated that his usages were experimental in nature, that he only took two or three puffs on each occasion, and that he did not intend to use illegal drugs in the future. Tr. at 95, 98, 105-106.

In addition to this testimony, which I found to be credible, other factors lead me to conclude that no valid security concerns remain under criterion (k). First, the record establishes that the individual has not used any illegal drug since April 2007. This two-year period of abstinence is supported both by the testimony mentioned above and by the negative results of a January 2008 drug screening. DOE Ex. 5 at 3. Second, the individual has never been diagnosed with any substance use disorder. Based on the evidence in this proceeding, I conclude that the individual's April 2007 and October 2006 marijuana usages were isolated incidents that are unlikely to recur. The individual has adequately addressed the DOE's security concerns under criterion (k).

B. Criteria (f) and (l)

I reach a different conclusion, however, with regard to criteria (f) and (l). The DOE security program is based on trust, and lying or deliberately omitting relevant information are serious breaches of that trust, making it difficult to determine to what extent the individual can be trusted in the future. *See, e.g., Personnel Security Hearing*, Case No. VSO-0281 (1999); *Personnel Security Hearing*, Case No. VSO-0013 (1995). In previous cases involving falsifications or deliberate omissions, OHA Hearing Officers have considered the following factors in determining whether the falsifier or ommitter has demonstrated adequate evidence of reformation: whether the individual came forward promptly and voluntarily to correct his falsification, *see Personnel Security Hearing*, Case No. VSO-0037 (1995), *see also Adjudicative Guideline E*; the length of time the falsehood was maintained; whether a pattern of falsification is evident; and whether a sufficient amount of time has passed since the falsification to permit the individual to establish a sustained pattern of honest behavior. *See, e.g., Personnel Security Hearing*, Case No. VSO-0327 (2000) (less than one year of truthfulness insufficient to overcome long history of long history of misstating professional credentials); *Personnel Security Hearing*, Case No. VSO-0289 (1999) (19 months since falsification regarding illegal drug usage not sufficient evidence of reformation).

Applying these principles to the present case, there is no evidence of a pattern of falsification. Indeed, the individual's friends and family testified that his falsification on the QNSP was an aberration, and that the individual is an honest and reliable person. Tr. at 12, 19, 35, 53, 65-66, 128. Despite this mitigating information, however, I find that valid security concerns remain regarding the individual's falsification because he did not come forward promptly and voluntarily to correct it, and because there has not been a sufficient amount of time since the falsification to permit the individual to establish a sustained pattern of honest behavior.

At the hearing, the individual testified that when he completed the QNSP on February 20, 2008, he was not fully aware of the importance of being completely honest and forthcoming in his answers. Tr. at 87, 94, 98. Several days later, he talked to a friend who had also applied for a security clearance. Tr. at 89. The individual said that his falsification on the QNSP "weigh[ed] heavily" on him, and after talking with the friend, he decided to "alleviate the situation" by admitting his marijuana usages to the OPM investigator. Tr. at 88, 91, 109.

I did not find this testimony to be credible. As an initial matter, I note that Question 24 of the QNSP reads, in pertinent part, that the “following questions pertain to the illegal use of drugs You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you” DOE Ex. 3. The certification directly above the individual’s signature on the QNSP says that “my statements on this form . . . are true, complete and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.” Id. On the same day that he completed the QNSP, the individual signed and dated a document that informed him that conduct or circumstances that tended to show that he is not honest, reliable, or trustworthy could raise doubt about his eligibility for a security clearance. Clearance Criteria Statement, DOE Ex. 4. It is difficult to imagine what additional steps the DOE could reasonably have taken to impress upon the individual the importance of being totally honest and forthcoming in his answers on the QNSP. Furthermore, it seems unlikely that the individual’s falsification was truly “weighing heavily” on him, given the delay of approximately six weeks between his decision to correct the falsification and the April 14, 2008, interview with the OPM investigator.

Finally, I do not consider the fact that the individual revealed his drug usage to the OPM investigator to be of significant mitigating value. Clearance applicants are required by DOE regulation and by federal law to respond honestly and truthfully to questions posed by investigators during the application process. *See* 10 C.F.R. § 710.6(a); 18 U.S.C.A. § 1001. Knowingly providing false information to the investigator could itself have been grounds for denying the individual a security clearance. I find no significant mitigating value in the fact that the individual has been honest in some, but not all, of the circumstances in which honesty was required of him. Given the circumstances set forth above, I further conclude that the 13 month period between his statements to the OPM investigator and the hearing is insufficient to establish a sustained pattern of honest behavior. In reaching this conclusion, I am aware that the period of time during which the individual maintained his deception (approximately two months) is relatively short when compared to the individual’s 13 months without a significant demonstrated falsehood. However, my misgivings about the veracity and sincerity of some of the individual’s testimony, outlined above, cause me to harbor continuing doubts about the individual’s honesty and reliability. The DOE’s security concerns under criteria (f) and (l) remain unresolved.

V. CONCLUSION

Although the individual has successfully addressed the DOE’s security concerns under criterion (k), valid security concerns remain under criteria (f) and (l). I therefore conclude that the individual has not demonstrated that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual should not be granted a security clearance at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: July 13, 2009